

2:15-cv-01045-RFB-PAL

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3
4 CUNG LE, et al.,)
5 Plaintiffs,) Case No. 2:15-cv-01045-RFB-PAL
6 vs.) Las Vegas, Nevada
7 ZUFFA, LLC, d/b/a Ultimate) Friday, April 9, 2021
8 Fighting Championship and) 11:05 a.m.
9 UFC,) STATUS CONFERENCE
Defendants.) **C E R T I F I E D C O P Y**

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13 REPORTER'S TRANSCRIPT OF ZOOM VIDEOCONFERENCE PROCEEDINGS

14 THE HONORABLE RICHARD F. BOULWARE, II,
15 UNITED STATES DISTRICT JUDGE
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19 APPEARANCES: See Pages 2 and 3
20

21 COURT REPORTER: Patricia L. Ganci, RMR, CRR
22 United States District Court
23 333 Las Vegas Boulevard South, Room 1334
Las Vegas, Nevada 89101

24 Proceedings reported by machine shorthand, transcript produced
25 by computer-aided transcription.

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1 LAS VEGAS, NEVADA; FRIDAY, APRIL 9, 2021; 11:05 A.M.

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3 P R O C E E D I N G S

4 THE COURT: All right, counsel. See what we can do
5 here. I'm going to call this case of Le, et al., versus Zuffa,
6 LLC, Case Number 2:15-cv-1045.

7 Let me say this for all of those who are watching or
8 listening, the Court does not authorize the recording by video
9 or by telephone or by other audio recording of these
10 proceedings. You must seek explicit permission from the Court
11 to record these proceedings or reproduce recordings of these
12 proceedings. Any party or entity or individual found to be
13 reproducing recordings, video or audio or otherwise, of these
14 proceedings can be held in criminal or civil contempt of this
15 Court. I just want to make that very clear.

16 If you want to obtain a copy of the record, you can
17 seek to do that through the normal procedure in terms of
18 requesting a transcript of the proceedings. So let me make that
19 clear.

20 Now, let me turn to counsel to announce their presence
21 starting with plaintiffs' counsel.

22 MR. SPRINGMEYER: Good morning, Your Honor. Don
23 Springmeyer, Kemp Jones, for the plaintiffs.

24 MR. CRAMER: Good morning, Your Honor. Eric Cramer,
25 Berger Montague, for the plaintiffs.

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1 MR. DELL'ANGELO: Good morning, Your Honor. Michael
2 Dell'Angelo, Berger Montague, also for the plaintiffs.

3 MR. MADDEN: Good morning, Your Honor. Patrick Madden,
4 from Berger Montague, also for plaintiffs.

5 MR. SUTER: Good morning, Your Honor. Mark Suter, also
6 from Berger Montague, on behalf of plaintiffs.

7 MR. DAVIS: Good morning, Your Honor. Joshua Davis on
8 behalf of the Joseph Saveri Law Firm, also for plaintiffs.

9 MR. KOFFMAN: Good morning, Your Honor. Richard
10 Koffman, from Cohen Milstein Sellers & Toll, also for
11 plaintiffs.

12 MR. SILVERMAN: Good morning, Your Honor. Daniel
13 Silverman, Cohen Milstein Sellers & Toll, also on behalf of the
14 plaintiffs.

15 THE COURT: All right.

16 For the defendants? Mr. Isaacson?

17 MR. ISAACSON: Good to see you, Your Honor. It's Bill
18 Isaacson, from Paul Weiss, for the defendant.

19 MS. GRIGSBY: Good morning, Your Honor. Stacey
20 Grigsby, from Covington and Burling, for the defendant.

21 MR. MIRKOVICH: Good morning, Your Honor. Samuel
22 Mirkovich, Campbell and Williams, on behalf of the defendant.

23 THE COURT: Are there any other attorneys for any
24 related parties? I know we have nonparties who filed in
25 relation to the Court's order. Anyone else?

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1 MR. MCKNIGHT: Hi, Judge. Good morning. You have
2 Riche McKnight. I'm actually general counsel for Zuffa/UFC.

3 THE COURT: Okay.

4 MS. JENKINS: Good morning, Your Honor. You have
5 Brooke Jenkins, from O'Melveny, for nonparty, Top Rank.

6 MR. KELLY: And good morning, Your Honor. This is
7 Philip Kelly on behalf of nonparty, Bellator.

8 THE COURT: Okay. Good morning.

9 Well, I will tell you that I'm going to change slightly
10 what we're doing today. As with many things, the Ninth Circuit
11 seems to have slightly changed my plans as relates to the
12 release of the order. As I was set to finalize it, the Ninth
13 Circuit issues its decision recently as relates to the -- a case
14 actually from this district, antitrust case.

15 I don't find necessarily that it's going to require
16 further briefing. I think I just have to incorporate some of
17 the law and look at again my decision and its findings with
18 respect to this current decision. I would still expect -- I'd
19 hoped to issue the decision before this hearing, but I expect I
20 will be able to issue it next week. But I wanted to request --
21 or not request -- ask the parties if they think anything else
22 needs to be done.

23 I think you both have submitted your positions. I
24 think you both have briefed this issue. The issues that are
25 identified in the opinion are issues that were raised actually

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1 by the parties in this litigation, I think. The only thing that
2 the opinion seems to make explicit is about the Court needing to
3 be very clear about what its findings are, and I think that was
4 one of the main issues, obviously, in that decision that the
5 Court found that Judge Du had not been explicit about what her
6 findings were with respect to the experts.

7 It was always my intention to make clear my findings
8 because I had had these hearings, and that's why. And now I'm
9 very glad that I did, in part, because we might have had to do
10 this all over again, like Judge Du would, had I not actually had
11 those hearings.

12 But I don't think there's anything else that needs to
13 be done. I'll start with you, Mr. Isaacson. I think that the
14 issues have been briefed. I have to look at the law and see how
15 it applies, if it's different than what I had anticipated or
16 expect -- expect, but I don't think we need further briefing. I
17 think I can still go forward with, sort of, finalizing my order,
18 taking into consideration the arguments that have been raised
19 because I think you did in fact raise actually the arguments
20 that were raised in that case.

21 Mr. Isaacson, I'll start with you.

22 MR. ISAACSON: Yes, Your Honor. It's a -- it's a
23 matter of what you find useful for -- for what you're doing. So
24 we are available for further briefing, but if you don't -- if
25 you don't think it's necessary, then that's fine.

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1 THE COURT: Well, and I don't -- but I guess my
2 question to you, Mr. Isaacson, is that it doesn't seem as if the
3 dispositive issues in that case are issues that were not raised,
4 in fact, in this case and briefed by the defendants. Is there
5 any way in which you think that somehow you hadn't actually
6 asserted some of the arguments that were raised in that case
7 before me such that the record is unclear?

8 MR. ISAACSON: (Pause.) Given the -- no, it's not a
9 matter of the record being unclear, Your Honor. So the -- you
10 know, we think that's an important case. We think when that
11 case, as we've said in our -- in our pleading, if applied to --
12 to the record of this case, means that class certification
13 should be denied. And -- but we have made the arguments as to
14 why class certification should be denied. We don't have new
15 arguments to make.

16 But we do think that that decision supports many of the
17 arguments that we have made.

18 THE COURT: I appreciate that. Thank you,
19 Mr. Isaacson.

20 And I'm not sure who's going to argue this for the
21 plaintiffs. Mr. Cramer?

22 MR. CRAMER: Yes, Your Honor. Thank you.

23 We agree that no further briefing is necessary, that
24 all of these issues have been raised, that Your Honor held a
25 seven-day seven-witness hearing sufficient to make all of the

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1 rulings necessary for class certification. I think Your Honor
2 identified the key issue.

3 The District Court Judge in the Seafood matter merely
4 found that the plaintiff's model was -- it was -- that the
5 plaintiff's model ...

6 THE COURT: Could --

7 MR. CRAMER: That it was not persuaded that the
8 plaintiff's model was unreliable --

9 THE COURT: Right.

10 MR. CRAMER: -- or incapable of proving impact. It
11 sort of just said it's plausible that it might be able to prove
12 impact.

13 But -- but I think we've always argued to Your Honor
14 that Your Honor needs to find that the plaintiffs' model -- that
15 Your Honor is persuaded that the plaintiffs' model is capable of
16 proving impact on a class-wide basis and is reliably capable of
17 doing so. And we --

18 THE COURT: Well, I will say, Mr. Cramer, it does seem
19 that that -- that Ninth Circuit case does seem to resolve the
20 issue of about potentially what the standard should be. It
21 doesn't seem to me in reading that case that the standard is
22 plausibility, because that's essentially what they reject.

23 Again, it does seem to me to be persuasiveness, which
24 is a part of the reason why, again, I had held the hearings
25 because I had anticipated that there might be an issue about

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1 this, which is why in terms of the Court's finding I am going to
2 apply the persuasiveness standard and had applied it when I
3 indicated I had previously approved the class.

4 So, I do think it resolves the issue because I know
5 that you all had taken the position that the evidence satisfied
6 both standards, but the plausibility standard was the standard.
7 I don't think that that is an argument that can be made at this
8 point, Mr. Cramer. Would you agree?

9 MR. CRAMER: I think you're -- you're right that it's
10 prudent to -- to -- to fall back to the standard that Your
11 Honor -- if Your Honor's capable of finding it, that plaintiffs
12 have put forward reliable -- that Your Honor is persuaded that
13 the plaintiffs have put forward reliable evidence capable of
14 proving class-wide impact.

15 I would say, Your Honor, just to point out the context,
16 in the Seafood matter, recall, the issue there was whether
17 plaintiff's model, according to the -- plaintiff's model was
18 capable of proving whether 95 percent was impacted, as the
19 plaintiffs said, or 72 percent impacted, as the defendant said.

20 That issue is not really what's going on here. Zuffa's
21 arguments here are that plaintiffs' model is not capable of
22 proving impact or damages at all to any class member, right.
23 Your Honor will recall and knows very well that Zuffa argued
24 that wage share was an improper basis for a model. Zuffa argued
25 that there are fundamental defects in plaintiffs' model. Those

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1 are all class-wide issues. Under Amgen every class member rises
2 or falls together on those issues. Zuffa's experts did not
3 raise this common impact question.

4 So I just think that's an important context. But all
5 of that said, Your Honor, I do agree that it would be prudent,
6 if Your Honor can find it, to find that Your Honor is persuaded
7 that the plaintiffs have put forward reliable methods of proving
8 class-wide impact.

9 I'd also say that there are two other important things
10 about that opinion, just for some more context. Number one, it
11 did make clear that plaintiffs' model does not need to show
12 impact for every class member; 95 percent is enough, according
13 to that opinion. And then there's that whole first part of the
14 opinion that makes very clear that plaintiffs' models in these
15 cases can rely upon regression analysis and other kinds of
16 statistical evidence in proving class-wide impact. So we think
17 that those two parts of that opinion are very important.

18 But to answer Your Honor's question specifically, we
19 agree that Your Honor should find, if Your Honor can find, that
20 plaintiffs' models are reliable and you're persuaded that
21 they're capable of proving impact on a class-wide basis.

22 THE COURT: Okay.

23 MR. ISAACSON: Your Honor, may I?

24 THE COURT: I fully expected that you would,
25 Mr. Isaacson. Please, go ahead.

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1 MR. ISAACSON: So, Mr. Cramer is misstating the
2 standard from the Ninth Circuit case when he says that the issue
3 is whether it's capable of proving. Your Honor actually has to
4 make a determination about -- based on the preponderance of the
5 evidence of whether the plaintiff has actually established
6 predominance under (b) (3). It's not a matter of capability.

7 The -- likewise, he is misstating the -- how you apply
8 that decision because in the facts of that case there was a
9 critique of the plaintiff's expert and opposing models that
10 showed that, I believe, the number was only 28 -- 28 percent
11 were uninjured. The -- here, you have a critique of the model
12 and it's showing that no one was injured. You have to weigh
13 that. You don't -- just because we don't -- we find 0 percent
14 as opposed to 28 percent doesn't mean that there's any change in
15 how you apply the facts.

16 In addition, he's glossing over that the model that he
17 says meets 95 percent was only run -- was not run over -- was
18 not applied to 95 percent of the class or 99 percent of the
19 class. The model was not even applied to 13 percent of the
20 class. It was only -- it was -- it was the large majority of
21 the class, but it was not run over that. So there was no --
22 Dr. Singer's table which showed as opposed to the -- for the
23 1,214 class members, he showed injury to around 1,050 and didn't
24 attempt to show injury for any of -- for any of the other ones.

25 So the -- the decision's discussion of injury is

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1 relevant both for the fact that our experts say even under their
2 model no one was injured and the model was not run over the
3 complete class. But --

4 MR. CRAMER: Your Honor, may I respond briefly?

5 THE COURT: Hold on a second.

6 MR. ISAACSON: That is not a request for further
7 briefing. We have made those -- we have presented those issues
8 in -- in our post-trial brief most recently --

9 THE COURT: And I also think that the opinion's
10 slightly different because it deals with statistical sampling,
11 which is slightly different than what happened here in terms of
12 actually having class members as opposed to trying to get a
13 representative statistical sample. That's a very different type
14 of statistical analysis that has to be done. And its
15 application is significant in part because it's representative,
16 quote/unquote, and it's not a full sampling.

17 But I take your point, Mr. Isaacson, that the Court
18 certainly has to weigh in on, based upon its opinion, and make
19 an explicit finding one way or another about whether or not the
20 plaintiffs' modelling sufficiently addresses sort of non --
21 quote/unquote, non-injured or uninjured class members or people
22 who may not be subject to any injury at all based upon the
23 plaintiffs' theory.

24 So I take that point. And that's part of the reason
25 why, again, I'm going to have to go back now and modify and edit

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1 my draft and take a look at to the extent to which it applies to
2 some of the arguments that are made here just to make sure that
3 to the extent I'm making findings they explicitly address the
4 issue. Because I do think one of the issues that's raised in
5 this Ninth Circuit case is the need for the Court to make very
6 clear its findings. I think that they -- the Ninth Circuit
7 essentially unequivocally said that if there are disputes
8 regarding predominance between the parties, the Court must make
9 a factual determination and not leave that to the jury regarding
10 disputes, particularly for modelling and the threshold
11 determination about predominance.

12 And so that's one of the issues that I'm going to go
13 back also and look at is what explicit findings would need to be
14 made because I think from a methodological and inquiry
15 standpoint that's something that I need to make sure that I have
16 done and if my analysis includes those particular findings and
17 discusses them. So I will look at that as it applies.

18 But I take your point, Mr. Isaacson. I do think that
19 that issue was briefed and it was a part of the testimony here
20 as well. You all questioned Dr. Singer quite extensively about
21 what his model you believe did not cover and what it didn't
22 show. So I think that the Court has the testimony which is why,
23 again, I don't think that I need further briefing in part
24 because we have the submissions, but we also have the testimony
25 on these issues.

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1 So I'm not sure if I cut you off, Mr. Isaacson. I
2 think that you had finished your point, but I did want to -- to
3 indicate that I -- that I agree that the Court does have to look
4 at the actual numbers as it relates to, sort of, antitrust, sort
5 of, injury and with respect to the proposed class members. And
6 I think that -- that's a direct mandate from the Ninth Circuit
7 after this -- after this decision.

8 Mr. Cramer, did you -- did you want to say something
9 else?

10 MR. CRAMER: Yeah, just briefly.

11 First, Your Honor, I agree that the issue regarding
12 representative sampling in Seafood is different than the issue
13 here. You'll recall here, Dr. Singer applied his model based on
14 individual characteristics on each and every class member and
15 found that over 99 percent were injured based on his analysis.

16 Number two, Mr. Isaacson's argument that the -- that
17 the model doesn't show injury to more than 98 percent is just
18 wrong and lawyer argument. You'll not find that argument in any
19 of their economic reports or any of their economic testimony.

20 Mr. Isaacson's right. They did argue the model shows
21 injury to zero, no one. But, again, that's a common question.
22 Whether the model works or doesn't work is a common question.
23 Whether the model applies to 72 percent or 95 percent, thus
24 leaving many, many uninjured, that might inspire individual
25 issues, but that is not the issue that Zuffa's experts raised

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1 and it did not come up at all at the hearing, Your Honor.

2 Dr. Singer found that over 99 percent of the class was
3 injured based on very extensive regression analysis that Your
4 Honor heard about and -- and other evidence of impact to each
5 and every class member except potentially a very few which were
6 identified and could be removed, if necessary.

7 And, finally, Dr. Singer testified that even if the
8 handful of class members that his model did not show were
9 impacted were removed, and we knew who they are, it does not
10 affect the damages because they weren't impacted. They had zero
11 damages. So they don't add to the damages.

12 But the ultimate conclusion, I think Your Honor is
13 exactly right, Your Honor needs to make a finding regarding
14 common impact, and that plaintiffs' model can show that more
15 than 95 percent of the class is injured which Dr. Singer
16 testified.

17 Thank you.

18 THE COURT: Okay. All right. I think that will
19 suffice for any particular post-case briefing that I would need.
20 Again, I think you have all briefed this sufficiently, but I
21 appreciate your comments.

22 And, Mr. Cramer, I also wanted just to address your
23 emergency motion and figure out where we stand with that. Does
24 the Court need to -- to weigh in? It sounds as if there have
25 been some conversations and discussions. So let me know about

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1 where we stand and what may need to be done or not.

2 MR. CRAMER: Yes. So this is -- Your Honor, thank you
3 for raising it. It's a real issue.

4 The Sparacino firm -- which has sent we believe at
5 least two misleading communications to multiple class members.
6 We don't know how many. They will not tell us -- has a response
7 date on our emergency motion of April 13th. So we're waiting
8 for their response. We know that they now have local counsel
9 and counsel to represent them. Zuffa has responded and made
10 some points. But we believe that this is a serious issue that
11 the Sparacino firm has sent two misleading letters to an unknown
12 number of class members --

13 THE COURT: Well, Mr. Cramer, I don't want to get into
14 the merits of being here.

15 MR. CRAMER: Okay. Fair enough.

16 THE COURT: I really just needed to check to see if it
17 was still a live dispute for which we would have to set a
18 hearing.

19 MR. CRAMER: It is a live dispute. The response date
20 is April 13 for the Sparacino firm to respond. We can respond
21 to whatever they file in a short amount of time. If they file
22 on April 13th, we could respond by April 20th, and would --
23 would appreciate it if Your Honor would address it by hearing
24 shortly thereafter.

25 THE COURT: Okay. No, I just wasn't -- I wasn't sure

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1 whether or not -- sometimes these things resolve themselves
2 before things are filed. And of course the Court has a fairly
3 busy docket so I need to just make sure of what things I need to
4 set for the docket.

5 What I am going to do is I know that we -- we were
6 initially going to be here for the issue of disclosure.
7 However, because of the filing or the issuance of the Ninth
8 Circuit's decision that prevented me from being able to finalize
9 my decision. So I'm -- what I am going to do is reset the --
10 reset the hearing. We'll look at our calendar because we have a
11 trial coming up, reset the hearing for the issue of disclosure
12 in a few weeks, and we'll look at the calendar and let you all
13 know that after the decision comes down.

14 But I don't think that it would be appropriate for me
15 to resolve it today until I issue my decision and that decision
16 incorporates the most recent decision made by the Ninth Circuit
17 earlier this week on these very issues.

18 So, we will hold off on that -- that conversation for
19 now. Is there anything else then we need to do -- so,
20 Ms. Grigsby, I appreciate you being here, but you probably were
21 here for all of the disclosure conversations. But we'll have to
22 hold off for now, but we will come back to finalize that -- that
23 conversation and disclosure after the issuance of the order in
24 this case.

25 MS. GRIGSBY: Yes, Your Honor.

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1 THE COURT: Okay. Anything else, then, we need to do
2 today? Mr. Isaacson?

3 MR. ISAACSON: Nothing else, Your Honor.

4 THE COURT: Mr. Cramer?

5 MR. CRAMER: Nothing else. Thank you, Your Honor.

6 THE COURT: From any other party representative?

7 No? All right, then. If there's nothing else,
8 everyone, please be well and be safe. We will be adjourned.
9 Thank you.

10 MR. CRAMER: Thank you, Your Honor.

11 MR. ISAACSON: Thank you, Your Honor.

12 (Whereupon the proceedings concluded at 11:25 a.m.)

13 --oOo--

14 COURT REPORTER'S CERTIFICATE

15

16 I, PATRICIA L. GANCI, Official Court Reporter, United
17 States District Court, District of Nevada, Las Vegas, Nevada,
18 certify that the foregoing is a correct transcript from the
19 record of proceedings in the above-entitled matter.

20

21 Date: May 12, 2021.

22

/s/ Patricia L. Ganci

23

Patricia L. Ganci, RMR, CRR

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